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In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF IDAHO EX REL. JOHN V. EVANS, GOVERNOR, ET AL., PLAINTIFFS

v.

STATE OF OREGON AND STATE OF WASHINGTON

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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This memorandum is submitted in response to the Court's invitation of March 5, 1979.

On December 7, 1976, the Court granted Idaho leave to file its original complaint against the States of Oregon and Washington insofar as it sought a determination of that State's "equitable portion of the upriver anadromous fishery of the Columbia River Basin." 429 U.S. 163, 164. However, the Court expressly left two matters open: (1) whether "the bill of complaint * * * states a claim upon which relief may be granted"; and (2) "the question of the indispensability of the United States as a party * * *, in the event the United States does not enter its appearance in the case." *Ibid.* After the defendants filed their answers, the case was referred to a Special Master. 431 U.S. 952 (1977). The Master conducted hearings and has now submitted his report to

the Court, which sufficiently recites the relevant facts. Report, at 6-11. We fully accept each of the Master's principal conclusions.

1. Although finding that "[t]he complaint states a justiciable controversy proper for the Court to consider and determine in the exercise of its original jurisdiction" (Report, at 17), the Master repeatedly indicates his view that, if at all possible, the controversy ought to be resolved elsewhere than in this Court. Thus, the Report stresses that "[a]ny decree in this case for an apportionment will require constant supervision and the exercise of continuing jurisdiction" (*id.* at 21); it adverts to the need to appoint a "fish-master", whose decisions "will have nothing to do with the Court's performance of its Article III judicial functions" (*ibid.*); and it notes that the case involves "complex and interrelated environmental, social, economic, legal, political and philosphical conflicts not solvable by judicial action" (*id.* at 24). The Master comments on "the undesirability, if not impropriety, of the Court's undertaking continued regulation of the Columbia River fishery" (*id.* at 22), and he concludes that "[t]he answers to all the conflicts presented is mutual accomodation and expert administration, not litigation" (*id.* at 24). See, also, *id.* at 20-22, 28-29. Nevertheless, in the final words of the Supplemental Report, the Master recommends that the dismissal of the action—required because the United States is an indispensable party and declines to intervene—should be "without prejudice to the right of Idaho to refile at some later date if Idaho is wholly unable to obtain a remedy through agreement" (*id.* at 31).

In sum, quite independently of his conclusion that the suit must be dismissed on the ground of the indispensability of the United States as a party, the Special Master entertains doubts about the ap-

propriateness of burdening any court, especially this Court, with the continuing responsibility for equitably apportioning the fishery and clearly prefers a negotiated settlement. Yet, the Master is sensitive to the claims of Idaho, as the State that "produces many fish and receives few" (Report, at 10), and he is accordingly reluctant finally to shut the courthouse door if all other avenues of relief prove unavailing. We entirely agree.

A Court seized of the record in *Washington* v. *United States*, No. 78-119 and companion cases, need not be reminded of the recurring legal and practical problems involved in apportioning a migratory fishery. In this case, moreover, the Court must feel some reluctance in effectively abrogating an agreed and judicially approved fishery plan for the Columbia River, which was executed only after more than eight years of litigation and still has almost three years to run. See Oregon Motion to Dismiss, App. A; Report, at 12-13.[1] And, finally, it is not clear that permitting the action to go forward would not implicate the operation of the several Columbia and Snake River dams by the United States, as well as its management of the anadromous fishery beyond the three-mile limit, both matters involving complex policy decisions not readily susceptible to judicial review.

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[1]Although the Special Master concluded that the pendency in the District Court for Oregon of *Sohappy* v. *Smith* and *United States* v. *Oregon* was not a bar to the present action (Report, at 4, 11, 29), he did not suggest that the Plan approved in that litigation could survive this suit. The present complaint seeks substantially to increase the escapement into Idaho of returning salmon and steelhead. If that prayer succeeds, the premise of the allocation between the States and the Tribes party to the Oregon Plan is undermined and the agreement is presumably vitiated. Nor does Idaho's undertaking to assert its claim only against the non-Indian share of the fishery save the Plan. Oregon and Washington are entitled to object and predictably would do so.

These considerations have persuaded us not to sanction the present proceeding by intervention. The same concerns, we submit, would justify the Court in dismissing the suit at this time even if there were no jurisdictional obstacle. Cf. *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). On the other hand, we believe Idaho ought not be foreclosed indefinitely from all relief. Our own belated efforts to secure an amicable solution thus far have not succeeded. But, we do not despair that more time will permit an accomodation to be reached. Obviously, the Court may supply a goad to that end if it follows that Master's recommendation and expressly reserves Idaho's right to refile after dismissal of the present complaint in the event no agreement is forthcoming. At all events, the United States will continue to cooperate with all concerned groups with a view to reaching a negotiated settlement of the dispute.

2. As we have indicated, the Special Master concluded that the United States is an indispensable party to this action and that, in the absence of intervention, the case must therefore be dismissed. The Report finds that no decree can be effective which does not adjudicate "[t]he rights and obligations of the United States, both as trustee of the Indians [who enjoy federal treaty fishing rights on the Columbia River] and as proprietor of the facilities [some eight hydro-electric dams] utilizing the waters of the [Columbia River] System" (Report, at 24). In our view, that is plainly correct. See *Texas* v. *New Mexico*, 352 U.S. 991 (1957); *Arizona* v. *California*, 298 U.S. 571-572, (1935).

Of course, as the Court itself noted here (429 U.S. at 164), the obstacle may be overcome by the intervention of the United States. See, *e.g.*, *Arizona* v. *California*, 373 U.S. 546, 551 (1963). We have

accordingly considered, and reconsidered, taking that step. See Report, at 17, 26-27. But, for the reasons just stated, among others, we have concluded against intervention at this time.[2]

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[2]Presumably, this Court need not assess the "wisdom" of the government's decision not to intervene. But see *California* v. *Arizona*, No. 78, Original (February 22, 1979), slip op. 4. We nevertheless volunteer the information that—besides the considerations recited above—our reluctance to intervene is influenced by a concern not to prejudice the presently recognized fishing rights of four Indian Tribes, parties to the Columbia River Fisheries Plan already mentioned. Unfortunately, Idaho's insistence that it does not seek to disturb the present apportionment in favor of those Tribes does not bind the defendant States, who may reasonably argue that the consequence of any increased Idaho share of the fishery must be borne by *all* fishermen of the Columbia River, including the Indians. See note 1, *supra*.

On the other hand, we owe a conflicting duty to protect the rights of the Shoshone-Bannock Tribes of the Fort Hall Reservation in Idaho, who traditionally fish on a fork of the Salmon River. See Report, at 26-27. At the present time, however, we are not persuaded that the rights of the latter Tribes cannot be secured by means other than this suit.

3. Having joined the Special Master in his major conclusions, we support his ultimate recommendation: that this action be dismissed, but without prejudice to the right to refile if Idaho is wholly unable to obtain relief by other means.

Respectfully submitted.

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